IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 461

In the Matter of

FEDERAL FACILITIES REALTY TRUST, a Common Law Trust, and NATIONAL REALTY TRUST, a Common Law Trust,

Debtors,

STACY C. MOSSER, Successor Trustee of National Realty Trust and Federal Facilities Realty Trust and JOHN W. GUILD, Indenture-Trustee, etc.,

Petitioners,

vs.

PAUL E. DARROW, Former Trustee of National Realty Trust and Federal Facilities Realty Trust,

Respondent.

ANSWER AND BRIEF OF RESPONDENT DARROW TO—

I. MOTION AND BRIEF OF WHISTON AND SCHWARTZ AS SUCCESSOR TRUSTEES.

II. BRIEF OF SECURITIES AND EXCHANGE COMMISSION.

III. REPLY BRIEF OF GUILD AS INDENTURE TRUSTEE.

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PRELIMINARY NOTE.

The Briefs of all opposing parties filed in this Court have admitted by silence the truth and accuracy of the "STATEMENT OF THE CASE" in Darrow's Main Brief (pp. 1 to 5). It is there pointed out that the surcharge of $43,447.46, with which the District Court had penalized Darrow, was set aside by the Court of Appeals, largely for the reason that the conduct of Darrow's employees, on account of which that surcharge was made by the District Court, *had resulted in no loss whatever* to either of the Bankrupt Estates; but on the contrary those very transactions of Darrow's employees had actually *resulted in very large benefits and profits* to both of the Estates. A quotation from the finding of the Court of Appeals on the point is set out in Darrow's Main Brief (p. 5). Nothing is said in any of the opposing Briefs filed in this Court disputing or denying that such benefit accrued to the Bankrupt Estates or challenging in any way the finding of the Court of Appeals in that respect. Accordingly we say the Court of Appeals reversed the District Court because of the utter injustice of the penalty assessed against Darrow.

I. ANSWER TO MOTION OF WHISTON AND SCHWARTZ TO BE SUBSTITUED AS PETITIONERS, AND REPLY TO THEIR BRIEF.

The Motion of Whiston and Schwartz "that they be substituted in this case for Stacy C. Mosser as Trustee" (Br. p. 2) should be denied.

Lack of Action by Whiston and Schwartz.

As we pointed out in our Main Brief (p. 7), Mosser ceased to be Trustee of National two months before his Petition for Certiorari was filed in this Court, and he ceased to be Trustee of Federal 18 days before that Petition was filed here. Both Whiston and Schwartz became Successor Trustees in Federal and National respectively as long ago as November 7, 1949—long before the Court of Appeals reversed the surcharge judgment against Darrow on August 14, 1950. We h[redacted]ur Main Brief (Appx. A viii) that on October 26, 1950 the District Court entered an order authorizing Whiston, as the sole Trustee of National (Mosser being already out as Trustee for that Estate), and authorizing Schwartz and Mosser, as Trustees of Federal (Mosser at that time still being a Trustee of Federal, jointly with Schwartz), "to file a Petition for Certiorari in the Supreme Court" in this case. It is significant that the District Court at the time of the entry of the order recognized the fact that Mosser had no right to file a Petition on behalf of National because it did not authorize him to do so. Later, and eighteen days before the Petition for Certiorari was filed, Mosser had also ceased to be Trustee of Federal.

Whiston and Schwartz were the lawfully appointed Successor Trustees when the Court of Appeals reversed the surcharge judgment against Darrow on August 14, 1950 and must be held to have full notice thereof. Moreover each of them was personally ordered and directed by the District Court to proceed to file a Certiorari proceeding almost two full months before the Petition was filed in this case on December 20, 1950. The conclusive result of the foregoing facts is that *both Whiston and Schwartz were derelict of their duties in not filing the Petition for Cer-*

tiorari in this case in their own names as authorized by the District Court. The Motion of Whiston and Schwartz here presented cannot give any vitality whatever to the utterly lifeless and nugatory Petition which was attempted to be filed by Mosser long after he ceased to have any right to do so.

Two Separate Estates—Not Consolidated Here.

In our discussion of the motion of Whiston and Schwartz attention should be called to the opening statement of their "Argument" (Br. p. 7) incorrectly but subtly suggesting that this is a "consolidated case" in this Court, and that accordingly a single Petition for Certiorari could properly be filed here by Mosser for both the Federal and National Estates, even though those proceedings were entirely separate Bankruptcy cases. It is for this Court to determine how serious is the jurisdictional defect produced by the failure of Whiston and Schwartz to secure a consolidating Order from the District Court authorizing those two separate cases to be consolidated for hearing in this Court. In that connection we point out that in the Reply Brief of Guild (p. 3) he also attempts to say, *entirely incorrectly*, that these two Bankruptcy cases are "now being brought to this Court as a consolidated case." There is no order of any Court authorizing a consolidation of the two Bankruptcy Estates in this Court.

We point out also (as admitted by the Guild Reply Brief (p. 2)) that by a special Order of the District Court, at the beginning of these Surcharge Proceedings, these two cases of National and Federal "were consolidated *in that Court only*, for the purpose of hearing the objections filed" to Darrow's accounts as Bankruptcy Trustee in these Estates. We also point out that Darrow (Rec. p. 593) was careful

to secure a special Consolidation Order in the District Court consolidating the two cases "for purposes of review and appeal therein *to the United States Court of Appeals.*" It seems clear that the force and effect of those two Consolidation Orders in the District Court became *functus officio* with the determination of the proceedings in those two Courts.

It is a matter of substance, so far as the Respondent Darrow is concerned, whether there should be a single consolidated Petition for Certiorari in this Court or whether in each of the separate Bankruptcy Estates there should be separate Petitions for Certiorari, *which this Court might permit to be consolidated.* We suggest that a joint Petition for Certiorari has not been properly or validly filed in this Court.

The Bankruptcy Statute Concerning Death or Removal of Trustees.

In their brief Whiston and Schwartz (pp. 8 to 11) first attempt to rely on the provision of the Bankruptcy Act (Title 11, Bankruptcy, U.S.C. Sec. 74) concerning "death or removal" of a Trustee in Bankruptcy. We call the Court's attention to the language of that Statute to the effect that "the death or removal of a Receiver or Trustee shall not *abate* any suit or proceeding *which he is prosecuting or defending at the time of his death or removal.*" (Italics added.)

If either Whiston or Schwartz had been "prosecuting" this Petition for Certiorari and either or both of them had then died or been removed, that Statute might be applicable here. Indeed if Mosser had been "prosecuting" this Petition before he ceased to be Trustee, then again that Statute might be applicable. But under the facts recited showing conclusively that Mosser *was utterly out of both*

Estates and that neither Whiston nor Schwartz attempted to file a Petition or Petitions here, we say that Statute is totally without aid or comfort to Whiston and Schwartz on their Motion.

Accordingly we submit that the cases cited by Whiston and Schwartz in support of their contention under that Statute (Br., pp. 10 to 12) are totally inapplicable here. Nevertheless we propose to discuss some of those cases later.

Rule 19(4) of This Court Concerning Substitution of Public Officers.

Whiston and Schwartz in their Brief (pp. 12 to 15) next attempt to rely on Rule 19(4) of this Court concerning substitution of "a public officer, by or against whom a suit it brought." That Brief rightly connects up that rule with Rule 25(d) of the Rules of Civil Procedure concerning substitution:

> "when an officer of the United States * * * is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office."

Here again we say that neither the cited Rule of this Court nor the cited Rule of the Rules of Civil Procedure concerning substitution gives any support to the Motion for Substitution. Both of those Rules are expressly concerned with a situation where a public officer of the United States *per se* (not a mere Bankruptcy Trustee) shall either die or cease to hold office "while the suit is pending" (Rule 19(4)), or "is a party to an action and during its pendency dies, resigns or otherwise ceases to hold office" (Rule 25(d)). Neither Whiston nor Schwartz in any way come within the purview of these two Rules—even though they should be considered public officers of the United States, in the sense of those Rules, which they are not.

Two Controlling Cases Against Whiston and Schwartz.

The precise question involved in the Motion for Substitution has been passed upon, directly adversely to them, by two controlling cases in this Court. In the case of *Davis* v. *Preston,* 208 U. S. 406, a judgment had been recovered in the Texas courts against Davis as Director General of Railroads and that judgment was affirmed by the highest court in Texas. Davis then filed a Petition for Certiorari in this court within the 90-day period allowed by law, and the Petition was granted. It was later discovered that when Davis filed his Petition, he had ceased to be Director General of Railroads and had been succeeded by Andrew W. Mellon. Mellon filed a Motion in this Court asking to be substituted for Davis, just as Whiston and Schwartz have done here. The Motion for Substitution was denied and the Certiorari proceeding was dismissed. In dismissing the Petition the Court said:

> "It now appears that when the Petition was presented Davis had ceased to be Federal Agent and had been succeeded in that office by Andrew W. Mellon * * *. Therefore Davis was not then in a position to complain of the judgment or to invoke a review of it by this Court. All right and discretion to do so had passed to his successor in office.
>
> "It follows that the Writ of Certiorari, granted on the Petition for Davis, was improvidently allowed and must be dismissed."

It is to be particularly noted in denying Mellon's Motion for Substitution the Court also said:

> "The succession in office as now appears occurred before there was any effort to obtain a review in this Court. After the succession Davis was completely separated from the office and without right to invoke such a review or exercise any authority or discretion in that regard. Therefore his Petition must be disregarded. The time within which such a review may be

> invoked is limited by statute and that time has long since expired. To grant the Motion in these circumstances would be to put aside the statutory limitation * * *."

It should be pointed out here that the status of a Director General of Railroads during World War I—having to do almost entirely with the private property of the Railroads and the claims of employees, etc.—made that functionary a "public officer" only in a limited sense. He could not fairly be called a public officer in the sense of one whose responsibility is predominantly to the public rather than to private interests. It is obvious that a Bankruptcy Trustee has a similar and almost identical status as that of the Director General of Railroads in the *Davis* case—he is a court officer it is true—but he is concerned predominantly with the private property of which he has title and over which he has complete control. Accordingly we say that both in logic and in law the rule of the *Davis* v. *Preston* case must be applied to Bankruptcy Trustees and is controlling here against Whiston and Schwartz.

Another leading and controlling case which is squarely against the Motion of Whiston and Schwartz is *Snyder* v. *Buck,* 340 U. S. 15, decided in November, 1950. In that case this Court dismissed a Writ of Certiorari in a proceeding brought by a widow of a member of the United States Navy to compel the paymaster of the Navy to pay her a widow's allowance. She had recovered judgment in the District Court on January 30, 1948. On March 18, 1948, the Government in the name of Buck as paymaster for the Navy filed a Notice of Appeal to the Court of Appeals. During the pendency of that Appeal and on March 1, 1948, Buck retired from his office and was succeeded by another. Under those circumstances the reviewing court (C.C.A.D.C.) 179 F. (2d) 466 held that the action had

abated and ordered the suit to be dismissed. On Certiorari this Court affirmed that judgment particularly relying upon *Davis* v. *Preston.* This Court in *Snyder* v. *Buck* specifically held that under the circumstances and the facts of the case:

> "The absence of a necessary party and the statutory barrier to substitution go to jurisdiction."

Therefore we find this Court only a few weeks ago holding, under circumstances closely similar to the procedural facts in the case a Bar that (even in the case of a "public officer" in the strict sense) the "absence of a necessary party" was jurisdictional and required the case to be dismissed. We respectfully say that the *Snyder* v. *Buck* case and the *Davis* v. *Preston* case both require the denial of the Whiston and Schwartz Motion for Substitution.

The Cases Cited by Whiston and Schwartz.

Among the cases strongly relied upon by Whiston and Schwartz (their Brief pp. 13-14) are four World War II Price Administrator cases: *Fleming* v. *Goodwin,* CC.A.8, 1948, 165 F. (2d) 334, cert. denied 334 U. S. 828; *United States* v. *Koike,* 164 F. (2d) 155, C.C.A. 9th (1947); *Porter* v. *Maule,* 160 Fed. (2d) 1 C.C.A. 5, (1947); *U. S.* v. *Seigel,* 168 F. (2d) 143 C.A.D.C. (1948). It is at once obvious that the Price Administrator of the United States is a public officer in the strict sense, dealing solely with public interests. In those four Price Administrator cases Administrator Bowles had been succeeded in office by another while each case was pending. In such pending cases his successor, as a Government official, was entitled to be substituted not only by virtue of law but by virtue of common sense. There is no analogy between the public government office of Price Administrator and a Bankruptcy Trustee.

Whiston and Schwartz (Br. p. 12) cite without any discussion eight cases and authorities as follows: *Bragg* v.

Gerstel, 148 F. (2d) 757, 758, C.C.A. 5th (1945); *Fox* v. *McGrath,* 152 F. (2d) 616, 618 C.A. 2d (1945); *Commercial Credit Co.* v. *County of Northumberland,* 23 F. Supp. 747 D.C.M.D. Pa. (1938); *Bowers* v. *American Surety Co.,* 30 F. (2d) 244 C.C.A. 2d (1929); *Sumpter Lumber Co.* v. *Sound Timber Co.* 257 Fed. 408 C.C.A. 9th (1919); *F. A. Mfg. Co., Inc.,* v. *Hayden & Clemens, Inc.,* 273 Fed. 374 C.C.A. 1st (1921); 1 American Jurisprudence 49; Cyclopedia of Federal Procedure, 2d Ed., Vol. 6, p. 117. We consider it unfair and indeed improper for Counsel to attempt to cast the burden upon opposing Counsel and upon the Court of reading and digesting cases merely cited in that fashion, and we will, therefore, also pass over those cases without discussion.

Whiston and Schwartz in their Brief do discuss a number of cases, none of which support their Motion. In the first of these, *Adams* v. *Johnson,* 107 U. S. 251, decided by this Court in 1883, the question of substitution was accorded little or no importance and was glossed over in the opinion. In any event, that case is squarely overruled by *Davis* v. *Preston* above cited.

The next case, *Gates* v. *Goodloe,* 101 U. S. 612, decided in 1880, is of no significance here. There a judgment had been recovered against a partnership consisting of three members. Thereafter two members of the partnership were adjudicated bankrupt. The third member filed a petition for Writ of Error in this Court in the names of all three partners for a review of the judgment. It was urged on Motion to Dismiss that the Order of adjudication against the two partners barred the Writ. This Court held that the partner who had not been adjudicated a bankrupt could prosecute the application for Writ of Error even if he used the names of all three parties. Obviously that case does not support the Motion for Substitution here.

In *Myers, et al.* v. *Canton National Bank,* 109 F. (2d) 31, there was involved an appeal from a judgment dismissing a complaint in which money damages were sought to be recovered from a bank and its receiver. An appeal was taken by the plaintiff to the Court of Appeals in which the bank and the receiver were named as appellees. It appears that prior to the time a Motion was made in the Trial Court to dismiss the complaint the original receiver had been succeeded by another and it was the successor receiver who joined in the Motion to Dismiss the complaint. However, when the appeal was prayed, as stated above, it was the original receiver who was named as Appellee along with the bank. The bank moved to dismiss the appeal on the ground that the successor receiver was an indispensable party. The Motion to Dismiss was denied and, in doing so, the Court held it was not necessary to determine whether the successor receiver was an indispensable or merely a proper party.

The cases of *Vass* v. *Conron Brothers Co.,* 59 Fed. (2d) 969 and *In re Morris White Holding Company,* 52 Fed. (2d) 499, both hold, as stated in the Whiston and Mosser Brief, that a Trustee in Bankruptcy is an "officer" of the Court which appoints him. With this statement we are in entire agreement. The case of *Vass* v. *Conron* involved the question of the right to sue a Trustee in Bankruptcy on his obligations as such in a State Court. It was held that his liability was as much a part of the usual administration in Bankruptcy as that of the pay of his employees and that an action against a Trustee, as such, must be brought in the Bankruptcy Court. The *Morris White Holding Company* case involved a question whether a Bankruptcy Court would permit foreclosure of a lien and the Court held that filing a petition for leave to bring a foreclosure suit against a Bankruptcy Trustee amounted to a submission of the controversy to the Bankruptcy Court's jurisdiction.

It is obvious that neither case lends any support to the Motion for Substitution here.

In *Callaghan* v. *R.F.C.*, 297 U. S. 464, there was involved only a question of trustee's fees. The Court held that bankruptcy trustees are officers of the Court and, like public officers generally, they must show "clear warrant of law" before compensation will be owing to them.

The case of *In re Prindible*, 115 F. (2d) 21 (1940), is not pertinent here because it merely held that Bankruptcy Trustees are "public officers" in the limited sense indicated in the *Callaghan* v. *R.F.C.* case *ante*.

The two cases of *Pufahl* v. *Est. of Parks*, 229 U. S. 217, 225 (1936) and *U. S.* v. *Weitzel*, 246 U. S. 533, 541 are cited for the doctrine that a receiver of a National Bank appointed by the Controller of the Currency are "officers of the United States." It is at once obvious that there is no comparison between a Bankruptcy Trustee who reports to the Court and represents creditors and a Receiver of a National Bank, because the latter "pays to the Treasurer of the United States money collected and makes to the Controller reports of his acts and proceedings." See the *Weitzel* case.

Darrow's Objections Jurisdictional—Not "Technical."

In the Whiston and Schwartz Brief (p. 16) it is stated that:

> "It is significant to note that the respondent Darrow's brief is directed primarily to technical questions of parties. Respondent's brief does not make a substantial effort to reply to the substantive questions raised by the petition for certiorari."

We resent and deny that assertion, and refer to our Main Brief on "The Lack of Merits", etc. (pp. 13 to 18). This Court has held in the *Davis* v. *Preston* case *ante* and also

in the recent *Snyder* v. *Buck* case *ante* that where a public agent has resigned his post or otherwise has ceased to have any authority whatever with reference to his former position, his action in filing a Petition for Certiorari in this Court is an utter nullity. The Court in those two cases further held that a Motion for Substitution, by a Successor in the post of the resigning official, lacks jurisdictional authority and will be dismissed by this Court. We, therefore, say that in addition to Darrow's objections to the Petition for Certiorari on the merits, his objections to the Petition and the Motion for Leave to Substitute, etc., are substantial and jurisdictional, and are not "technical" in any sense.

II. REPLY TO BRIEF OF SECURITIES AND EXCHANGE COMMISSION.

The Biased and Slanted "Statement" of the S.E.C.

More than one-half of the S.E.C. Brief (pp. 2 to 11) is taken up with what we consider a biased and slanted "*statement*" of what that Agency would like this Court to believe are the controlling facts here. That "Statement" is principally an effort to paint the two part-time employees of the Respondent Darrow as Trustee, in the worst possible light. We do not propose to reargue the fact for the purpose of rebutting this *factual* Argument of the S.E.C.—although that could readily be done. We again call the Court's attention to the "*Statement of the Case*" in Darrow's Main Brief (pp. 1 to 5)—not a single item or word of which is disputed or contested by the S.E.C. factual Argument. As to the ultimate facts we think this Court will prefer to rely on the full and fair statement of the facts found in the Opinion of the Court of Appeals.

The S.E.C. the Real Instigator of This Petition.

In Respondent Darrow's Main Brief (Appx. B, pp. x to xii) there are set out certain portions of the official Transcript of Record of the proceedings before the District Court on October 26, 1950, when that Court authorized its Trustees Whiston and Schwartz (and Mosser who shortly thereafter resigned) to file Certiorari proceedings in this Court on behalf of both Federal and National.[1] That Transcript of Proceedings (p. 1) shows the appearances of Counsel on behalf of Whiston and Schwartz and Mosser (who were the Petitioners for the Order in Question); and also shows that "Mr. Edward P. McGuire appeared on behalf of the S.E.C." Since the Bankruptcy Act, Title 11, Bankruptcy, U. S. C. A. 608, as we have seen, contains a mandatory prohibition to the effect that:

> "The Commission may not appeal or file any Petition for appeal in any such proceeding,"

the S.E.C. was without any authority whatever to appear in the District Court in support of that Petition or to "prosecute" the Petition for Certiorari in this Court, as it is doing. We go further and say reluctantly that the portions of that Transcript set out below, clearly prove that the S.E.C., in complete violation of the statutory prohibition against appeals or petitions for appeal by that

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[1] It should be particularly noted that this authorizing Order of the District Court of October 26, 1950, stated among other things that

> "Frank M. Whiston as Successor Trustee of National Realty Trust and Joseph Schwartz and Stacy M. Mosser, Successor Trustees of Federal Facilities Realty Trust, be, and they are hereby, authorized to file Petition for Certiorari in the Supreme Court" etc.

As we have suggested in our Reply to the Whiston and Schwartz Brief, the proper thing for those two Trustees of separate Bankruptcy Estates to have done following the Order of October 26 (or indeed in that Order itself) was to have gotten a direct Order of the District Court consolidating these two Estates (which are totally separate cases in the District Court) for the purposes of this Certiorari proceeding.

Agency, is nevertheless the real instigator of this Petition for Certiorari, as shown by the following:[2]

"The Court: Do I understand that the Securities & Exchange Commission will join in this thing?

"Mr. McGuire: Yes, your Honor. We will file a supporting brief.

"The Court: You will file your brief incident to the trustees' brief?

"Mr. McGuire: Yes.

* * *

"The Court: Who from Washington is going to argue the case for certiorari? The SEC will have its solicitor?

"Mr. McGuire: The SEC will have its solicitor there.

"The Court: If the SEC is willing to undertake the laboring oar here I would be willing to approve the matter of the appeal. The only point that presents itself to me here is a different one than, of course, is presented to the SEC, Mr. McGuire. I am concerned now and must be conscientiously with the preservation of the assets of this estate. You are concerned with the state of the law in this circuit and should properly be so concerned. I am too in a general way, but in this case my duties are to this particular estate. Now to burden this estate with a tremendous cost in order to rectify the law of the circuit, if indeed it needs rectification—I do not for the record say that it does—but who am I to disagree with my better? At the same time that apparently is the opinion of your Commission?

"Mr. McGuire: That is right.

"The Court: Or you would not be joining in this appeal. Is it fair to the creditors of this estate for me to undertake so large a burden? I would be persuaded in granting this petition if I knew that the major portion of the work of the appeal, the legal work,

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[2] Counsel for Respondent Darrow has filed in the office of the Clerk of this Court the full official certified copy of that Transcript of Proceedings.

the major portion of the legal work would be undertaken by the SEC and maybe the trustees had to file only more or less pro forma in order to comply with perfecting their certiorari. What do you have to say on that?

"Mr. McGuire: We are prepared to go all the way on this, your Honor, and be as diligent as we possibly can. As I say we will file a supporting brief and assume at least a portion (sic) and argue this matter.

* * *

"The Court: You represent further to the court, Mr. McGuire, the Securities & Exchange Commission will undertake a major portion of the work involved?

"Mr. McGuire: That is right.

"The Court: Your solicitor in Washington will argue the appeal?

"Mr. McGuire: That is right."

* * *

Respondent Darrow respectfully challenges any right or authority of the S.E.C. whatever to give the above assurances to the District Court that the Commission "would join in this appeal"; "that it would go all the way on this"; and "that it would undertake the laboring oar here," so far as this Petition and Appeal in this Court here is concerned. We respectfully urge that in view of the above quotations from the Record before the District Court and in view of the above cited clear statutory prohibition against the S.E.C. appealing in Bankruptcy reorganization that:

1. The S.E.C. is proceeding in direct violation of both the letter and the spirit of the mandatory prohibition of the Bankruptcy Statute above quoted.

2. The S.E.C., in spite of its utter lack of authority in the premises, is the real instigator and actual proponent of this purported Petition for Certiorari. The fact that the S.E.C. attempts to appear here through a Brief in the guise of *amicus curiae* does not alter the point that it is in truth the real instigator and the real prosecutor of this Petition.

3. The S.E.C. is seeking to have this Court take jurisdiction and pass upon a purely abstract and hypothetical question of law, contrary to the long established doctrine of this Court that it will not assume jurisdiction to decide such questions.

We submit that if the actions of the S.E.C. in this proceeding are permitted to go unchallenged, then the entire force and effect of the above statutory prohibition against Appeals by the S.E.C. in Bankruptcy proceedings will be circumvented and annulled. Moreover, unless the efforts of the S.E.C. are challenged here, this Court may unwittingly be led into considering and passing upon mere abstract propositions of law solely because the Commission desires that to be done.

The Effort to Make New Law.

As already urged in Darrow's Main Brief (pp. 14, *et seq.*) the sole purpose of the Petition for Certiorari here (on behalf of all parties including the S.E.C.) is merely an effort to make new law with respect to surcharging Bankruptcy Trustees. In our Argument before the Court of Appeals we challenged opposing Counsel, including Counsel for the S.E.C., to cite a single Bankruptcy case, either in America or England, in which the courts had adopted the Draconian doctrine with respect to surcharging Bankruptcy Trustees which the Commission and the purported Petitioners insist should be applied in this case. The Court of Appeals took note of our challenge in this respect and said in its Opinion:

> "The Appellees have not met the challenge of the Appellants. The Brief filed on behalf of the Securities and Exchange Commission cites no case, which supports or even tends to support, the surcharges made against Darrow in the case at bar."

In spite of that rather critical language of the Court of Appeals the S.E.C. (as well as all the purported Petitioners) again fail to cite in this Court a single new or additional case supporting their contentions as to surcharging Darrow. A check of the opposing Briefs filed in this Court will show that every case there cited, in the effort to surcharge Darrow, was fully argued and discussed below.

No person can fairly object to forceful and vigorous action by the S.E.C. in Bankruptcy Reorganization proceedings within the purview of the statutory authority given that Commission, in the District Courts. But when the Commission without any authority whatever attempts to foment review proceedings by others for the sole purpose of establishing *new law,* as it is obviously doing here, we respectfully say that the Respondent Darrow is entitled to urge on this Court that such efforts and tactics should be brought to a halt. As matters now stand, after the decisive Opinion of the Court of Appeals, the S.E.C. appears as a principal party in an effort to surcharge Darrow without any authority of law and has forced upon him the heavy burden and expense of many years of litigation to relieve himself of a large surcharge and to clear his name in the community.

The Law as the S.E.C. Would Like It.

When the legal contentions of the S.E.C. in this whole proceeding are analyzed (as well as those of the other purported Petitioners) it is clear that all parties here are attempting to establish as new law the following proposition, namely:

> That Darrow as a Bankruptcy Trustee should be penalized and surcharged for profits realized by his part-time employees as a result of their trading in the

securities of the subsidiaries of the two Bankruptcy Estates of which he was Trustee, notwithstanding the admitted facts that such transactions were all made at the open market prices; that Darrow did not personally participate in such profits directly or indirectly; and that no loss whatever resulted to either of the Bankruptcy Estates; but on the contrary, as found by the Court of Appeals, such transactions themselves resulted in large profits and benefits to both Estates. (See our Main Brief, pp. 4 and 5.)

We respectfully submit, in spite of all the subtle suggestions to the contrary [3] that the above statement represents, fairly and fully, the application of the law concerning surcharging Bankruptcy Trustees as the S.E.C. would like to have it.

The S.E.C. Bankruptcy Cases Not Applicable Here.

In its Argument (Br., pp. 11 to 18) the S.E.C. cites a number of Bankruptcy cases some of which it discusses at some length. All of those cases, as we have said above, were fully argued by the Commission in the Court of Appeals and with respect to them that Court said the S.E.C. "cites no case which supports or even tends to support the surcharges made against Darrow." The plain fact is that all of the Bankruptcy cases cited by the S.E.C. here (as well as the other purported Petitioners) are so totally different on their facts from the *Darrow* case as to be entirely inapplicable. All of those cases where a surcharge was made, *involved actual losses suffered* by the creditors, due to the wrongful conduct of the Bankruptcy Trustees—something

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3 The S.E.C. Brief (p. 2) attempts to set out what it calls the "*Question Presented.*" We say that statement of the question is biased and colored since it omits entirely all reference to the fact of the complete lack of personal guilt or personal activities on behalf of Respondent Darrow and because it entirely omits any reference to the fact that the transactions of Darrow's employees, which are complained of here, actually resulted in very large benefits and profits to the Bankrupt Estates.

entirely absent in the *Darrow* case. All of those cases also involve *either personal profits or personal malfeasance* of the Trustee—again a factor that is entirely lacking in the case at bar. We have stressed this point about the utter inapplicability of the Bankruptcy cases cited by the S.E.C. here (as well as the other purported Petitioners) because any fair analysis of those cases establishes our contention about the effort here to make new law.

Cases of Equity Trusteeship Entirely Inapplicable Here.

It is a fundamental proposition in the Law of Bankruptcy that the rules concerning the liability of Bankruptcy Trustees, where surcharges are involved, are not at all the same as the rules concerning those matters where the liability of a Trustee in Equity is involved. Equity Trustees are either those (a) who have voluntarily undertaken to act in the Trust capacity or (b) those who are held Trustees *ex maleficio* by the Equity courts. A Bankruptcy Trustee on the other hand has a totally different capacity and has duties and responsibilities of a totally different character. The English Bankruptcy Court two centuries ago pointed out the distinction between Equity Trustees and Bankruptcy Trustees in the noted case of *Ex Parte Belchier*, 1 Amb. 218, 27 Full English Reprint 144, decided by Lord Hardwicke in 1754.[4] No cases or authorities need be cited here for the proposition that our American Bankruptcy courts have consistently followed the doctrine of the *Belchier* case.

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[4] In that case Lord Hardwicke stated the applicable doctrine concerning the liability of Bankruptcy Trustees as distinguished from the liability of Trustees in Equity, when he said:

> "If an Assignee (in Bankruptcy) is liable in this case no man in his senses would act as Assignee under the Commissioners in Bankruptcy. This court has laid down a rule with regard to the transactions of Assignees and more so of Trustees so as not to strike terror into mankind acting for the benefit of others and not for their own."

An Equity Case Strongly But Erroneously Relied Upon.

One of the principle cases relied upon by the S.E.C. here (Br., p. 15) and strongly relied on by the Petition for Certiorari (p. 23) is *Meinhard* v. *Salmon,* 249 N. Y. 456, 164 N. E. 545. When the New York case is analyzed it will be found that its facts and circumstances are as different from those in the *Darrow* case as day from night. The New York case involved a situation where two men were engaged as "joint adventurers" in a large real estate deal, and one of them charged his partner with defrauding him. The court on the facts quite properly held the defendant guilty, and held him liable as Trustee *ex maleficio* for the loss which he had thrown upon his partner, and for the profits which he had made at the expense of his partner. In laying down the doctrine of law applicable to the case the Court begins with the following language:

> "Joint adventurers, like co-partners, owe to one another, while the enterprise continues, the duty of the finest loyalty."

Nevertheless it is this "joint adventurers" case, where the guilty party is surcharged as Trustee *ex maleficio,* that the S.E.C. Br., p. 15) seizes upon as fixing:

> "The fiduciary standards by which a reorganization trustee's conduct must be measured."[5]

A Purely Abstract and Hypothetical Case Here Presented.

We conclude our Reply to the S.E.C. Brief by again suggesting that the Commission is here engaged in a purely abstract and hypothetical effort to establish *new law* with

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[5] In the same way the Petition for Certiorari in this case (Br. p. 23) concludes its "*Argument*" by referring to this *Meinhard* v. *Salmon* case as establishing the doctrine concerning surcharging of Bankruptcy Trustees "which 'has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions' (*Meinhard* v. *Salmon,* 248 N. Y. 458)."

respect to surcharging Bankruptcy Trustees. This is true *first* because there has been no damage or injury whatever to the creditors or anybody else in these two Bankruptcy Estates because of the alleged misconduct of Darrow's part time employees, but on the contrary large benefits and profits resulted to the two Estates from those very transactions; *second,* because there is not even a semblance of authority in the Books upon which the S.E.C. (and the other purported Petitioners here) can rely in an effort to involve the jurisdiction of this court on review.

III. REPLY TO BRIEF OF GUILD AS SUCCESSOR INDENTURE TRUSTEE.

The Indenture Trustee Has No Real Interest Here.

An examination of the Petition for Certiorari, as well as an examination of the Reply Brief filed by John W. Guild as Successor Indenture Trustee, will show in convincing fashion that the Indenture Trustee has no real and substantial interest whatever in this Certiorari proceeding. If the "Reasons Relied on for Allowance of Writ" set out in the Petition (p. 6) are analyzed it will be found that they are all of them based on purely abstract contentions. Indeed the gist of this whole proceeding, so far as Guild is concerned, is stated in Reason No. 4 which reads as follows:

> "4. The decision of the Court of Appeals, if permitted to stand, will result in a serious impact against, and a diminution of, the high standard of ethics, necessarily required in the important and ever-widening field of reorganization proceedings and fiduciary obligations.".

Nowhere in either the Petition or in Guild's Reply Brief is there any allegation or even suggestion that the bondholders represented by Guild as Indenture Trustee have any financial interest whatever in urging this Certiorari proceeding on this Court.[6]

It is true that under the Bankruptcy Act (11 U.S.C. Bankruptcy Sec. 606) creditors in Reorganization Proceedings, including specifically Indenture Trustees, are given certain special rights with respect to being "heard on all matters." It is true also that the Courts have expanded that provision to grant Indenture Trustees the right to appear in Appeal Proceedings—*where the Indenture Trustee asks leave of the Reviewing Court, something that was not done here.* But we say that the right of an Indenture Trustee to Appeal must tbe based on some substantial financial interest and that any such interest is entirely lacking here.

Guild an Indenture Trustee in One Case Only Here.

As we have pointed out elsewhere in this Reply Brief there are two separate and distinct Bankruptcy Estates involved in this Petition for Certiorari. The two cases in the District Court are entirely separate there and carry

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[6] *Utter Lack of Financial Interest Admitted.*

The plain fact is that there is an utter lack of financial interest in the prosecution of this Certiorari proceeding on behalf of all of the purported Petitioners here, including Guild. During the Oral Argument before the Court of Appeals the Court itself asked the question of Darrow's Counsel whether any creditor was interested financially in the result of the surcharge against Darrow, and would suffer any loss if the surcharge finding were reversed. Darrow's Counsel replied by repeating the point which had already been stated on Oral Argument, without refutation, that both Estates would pay out 100% for all creditors without this Darrow surcharge. The Court gave opposing Counsel full opportunity to deny that fact but it was openly admitted by silence. The fact of complete lack of any financial interest of any party to this Petition for Certiorari must also be admitted in this Court.

totally different case numbers in that court. While the two Bankrupt Trusts were both engaged in the same general business they were and still are separate entities; each with its own assets and each with its own separate creditors. Although the District Court had surcharged Darrow $43,447.46 it had utterly failed to allocate the portion of such surcharge which would be distributed as profits to each of these two Bankrupt Estates. (See Darrow's Main Brief, pp. 2 and 3.) Guild as Indenture Trustee is interested only in the Federal Facilities Estate but he fails to point out that fact in his Reply Brief. Indeed he signed the Petition and his Reply Brief as "John W. Guild Indenture Trustee"—as if he were interested in both Estates.

CONCLUDING COMMENT.

The Respondent Darrow has no desire to rely on merely technical or unsubstantial grounds in opposing the Petition for Certiorari here presented. It is strongly urged, however, that the following points have been clearly established on the Record before this Court:

First. The original Petition here filed totally fails to meet the jurisdictional requirements of this Court in Certiorari proceedings and should be denied.

Second. The Motion of Whiston and Schwartz to be substituted herein in lieu of Mosser also utterly fails to meet the jurisdictional requirements of this Court and should be denied.

Third. Guild as Indenture Trustee fails entirely to show any substantial interest financially or otherwise in this proceeding and the Petition for Certiorari should be denied as to him.

Fourth. The Securities and Exchange Commission has attempted to put itself above the law, and in plain violation of the provisions of the Bankruptcy Act in

its effort to present a Brief as *amicus curiae* herein and that Brief should be stricken.

Respectfully submitted,

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Dated at Chicago February 15, 1951.